From: Paul Rupe
To: Microsoft ATR
Date: 12/8/01 3:03am
Subject: Microsoft Settlement

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Upon reading the proposed settlement in the US vs. Microsoft anti-trust case at <http://www.usdoj.gov/atr/cases/ms-settle.htm>, I am struck by how little it actually accomplishes. The terms of this lopsided "compromise" truly leave me in doubt of who actually won the trial. While some Microsoft proponents will no doubt claim that any desire to see a stronger remedy demonstrates an envy toward a successful company, I only wish to see a fair marketplace where interoperable products can compete on their own merits.

Below are specific weaknesses in the current settlement proposal and some suggestions for additional remedies:

Section III.J.1:

> "No provision of this Final Judgment shall: Require Microsoft to document, disclose or license to third parties: (a) portions of APIs or Documentation or portions or layers of Communications Protocols the disclosure of which would compromise the security of a particular installation or group of installations of anti-piracy, anti-virus, software licensing, digital rights management, encryption or authentication systems..."

I see two problems with this:

First, Microsoft can manipulate the design of their software so every major component is somehow inextricably tied to some security measure. They already attempted to finagle their way through the trial by claiming that their Internet Explorer web browser was an integral part of the Windows operating system and that separating them was technically infeasible. I have no doubt that Microsoft will try to do the same "integration" with DRM or other components protected by this clause in order to close off as much information as possible to would-be competitors. For example, nothing stops Microsoft from adding some trivial encryption scheme to Word documents and then claiming that it is an anti-piracy measure that must be kept secret. No one can license rights to this new "encryption" under this clause, and anyone who attempts to reverse-engineer and discover it on their own risks prosecution under the Digital Millennium Copyright Act (DMCA).

Second, the restriction is completely unnecessary--and in fact, antithetical--to the goal of providing consumers with secure, high-quality software. Instead, it promotes "security by obscurity". History has shown again and again that the most secure protocols are those that are openly available for analysis and critique by unbiased experts in the field. The well-documented Pretty Good Privacy (PGP) system has been around for years without a major security flaw, while closed, proprietary systems like Microsoft's own access control mechanism in Windows Media Player are cracked[1] with almost laughable ease. Frankly, if merely disclosing the algorithm behind a particular security measure is enough to compromise it, then it is not very secure to begin with. Given the very real costs of data loss and identity theft in today's world, we cannot afford to use anything less than the most robust and well-researched security measures available.

Section III.J.2:

> "(c) meets reasonable, objective standards established by Microsoft for certifying the authenticity and viability of its business"

This clause conveniently allows Microsoft to exclude all open source development from the benefits of Section III, thus shutting out a major competitor[2]. Microsoft has publicly stated that they consider the free software movement a "cancer"[3], so we can safely assume that the chances of (for example) Linux meeting any such standards they set are zero. The goal of this anti-trust remedy is to restore fair competition

to the marketplace. It is a mockery if Microsoft is allowed to pick and choose its competitors.

The only fair thing to do is make all communications protocols, file formats, and APIs publicly available free of all licenses and restrictions. I am very disappointed that Section III.J gets bogged down with terms like "intellectual property". As a software engineer, I can say that there is rarely anything insightful or innovative about file formats or communications protocols themselves. Usually they are simply arbitrary arrangements of fields in a data structure, the result of convenience to a particular implementation rather than clever research or design. Protecting them as if they were groundbreaking inventions serves only as an artificial barrier to interoperability and certainly does nothing to "promote the progress of science and useful arts" as the Constitution states.

The idea that one company can gain exclusive rights to something as basic as a method of arranging data is absurd. It would be like Ford saying no other auto maker could put the gas pedal on the right and brake on the left. Ford's actual mechanical implementation of gas and brake pedals may very well be protected, but the left-right arrangement itself should not be. Microsoft's hypocrisy in this regard is particularly astounding. There would not even be a World Wide Web for them to dominate were it not for open standards like TCP/IP and HTTP; yet they want to keep their own communication protocols secret for the sake of "innovation". True innovation comes from competition and competition requires interoperability.

Since Microsoft has deliberately used proprietary data formats and APIs as weapons against the competition, they should have the ability to freely create such things taken away from them. Forcing them to publicly disclose all such interfaces in advance and without any licensing restrictions would not punish Microsoft unduly nor put them at a disadvantage. It would only level the playing field again and allow other companies to build fully compatible products that can compete on merit alone.

Also missing from this settlement is any remedy for Microsoft's past behavior. The current trial has been going on for years, all the while Microsoft has brazenly used the same monopolistic tactics to tighten their grip on the marketplace. As almost a slap in the face to this trial, the recently released Windows XP has more bundled features and more blatant promotion of Microsoft-affiliated services than ever before. Any remedy that does not address that is an insult to the anti-trust laws and to the American people. As a start, I humbly suggest a large monetary donation to the Free Software Foundation[4].

Since Microsoft is a repeat offender, the punishment here should have a strong deterrent value. Logically, if the cost to Microsoft of yet another anti-trust trial five years from now is less than the benefit of continuing their anti-competitive practices, then they have absolutely no reason to change. If this happens, then the Department of Justice has wasted its time and staggering amounts of taxpayer money for nothing.

I am pleased that Section III.A finally acknowledges once and for all that the exclusionary contracts between Microsoft and OEMs are unlawful due to Microsoft's monopoly status. But by similar reasoning, should the End-User License Agreements (EULAs) between Microsoft and consumers also be examined? In particular, consider the "as-is" clause that absolves Microsoft of any liability for the damage resulting from defects in their software. Among other things, this prevents consumers from seeking compensation for the billions of dollars in damage done by malicious software such as Code Red, Nimda, and countless e-mail viruses that can exist only because of gaping security holes[5] in Microsoft's

software. Ruling Microsoft a monopoly means that consumers were forced to accept this "as-is" clause under duress, so like the OEM contracts, perhaps it should be voided as well.

Another remedy is inspired by the actions against tobacco companies. When they were deemed harmful to consumers, all tobacco products were required to carry a strongly-worded health warning. Similarly, since Microsoft has been found guilty of hindering free market competition at the expense of consumers, require all of their products to bear a short, factual statement to that effect. Provide consumers with all the facts without any positive "spin" by Microsoft so they can make an informed decision. If this sounds harsh, consider that individuals convicted of serious crimes lose some of their rights and gain a permanent mark on their record. Microsoft should be no different.

The settlement currently proposed would change very little. It leaves Microsoft with too many loopholes to effectively continue doing business as usual and fails to address the damage already done and continuing to be done even now. I would rather see the trial continue for another year or two and produce an effective remedy than accept a watered-down, short-term compromise that will lead only to another round of violations and court trials in a few years. I hope the Department will truly consider these points and take the time to devise a more substantial remedy, one that seeks less to accomodate a guilty party and more to reestablish meaningful competition in the PC software industry.

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[1] "MS digital rights management scheme cracked"
<http://www.theregister.co.uk/content/4/22354.html>
[2] "MS promotes Linux from threat to 'the' threat - Memo"
<http://www.theregister.co.uk/content/4/22770.html>
[3] "Ballmer: 'Linux is a cancer'"
<http://www.theregister.co.uk/content/4/19396.html>
[4] "Free Software Foundation"
<http://www.fsf.org/>
[5] "Nimda Worm Shows You Can't Always Patch Fast Enough"
<http://www3.gartner.com/DisplayDocument?doc_cd=101034>

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"She smiled, in the end."